83-717

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALLEN C. MORROW AND SARAH F. MORROW,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether 18 U.S.C. 844(h) prior to its 1982 Amendment, applied to the burning of a building set on fire by kerosene, under circumstances where no explosion occurred.

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TABLE OF CASES*

*The cases cited were briefed and argued before the United States Court of Appeals for the Third Circuit and relied upon in the Court's Opinion.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners move this Honorable Court to issue a Writ of Certiorari to review the Judgment and Opinion entered on September 16, 1983, by the United States Court of Appeals for the Third Circuit.

DECISION BELOW

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit, filed on September 16, 1983, is found in the Appendix (A. 1-10).

JURISDICTION

This is a petition from the September 16, 1983, affirmance of the December 8, 1981, conviction of the Petitioners in the United States District Court for the Middle District of Pennsylvania, which court found Petitioners guilty of one count of conspiracy and twelve counts of mail fraud.

Jurisdiction is invoked under Article 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 18, United States Code, Crimes and Criminal Procedure,

Section 232(5):

§ 232. Definitions

(5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, grenade, fire bomb, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

Section 844(h)* and (j):

§ 844. Penalties

(h) Whoever–

(1) uses an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

* * * * *

(j) For the purposes of subsections (d), (e), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by

*prior to its 1982 amendment by the Anti-Arson Act of 1982, Pub.L. 97-298, 96 Stat. 1319 (1982).

concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion. (Added Pub.L. 91-452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 956.)

STATEMENT OF THE CASE

Petitioners acknowledge that the essential facts have been accurately stated in Judge Teitelbaum's Opinion. Evidence of how Petitioners' building was destroyed came from various police officers and firemen who fought the fire, from the three persons who actually set the fire, and from A.T.F. agent Warren L. Parker, whose opinion was received over objection of Petitioners. counsel. This evidence was summarized as follows (A. 4):

> The evidence established that Kiefer and Bonsal purchased twenty gallons of kerosene for the purpose of destroying the adult bookstore in Johnstown. They contacted Cislo, the manager of the bookstore, and enlisted his assistance in entering the building without activating a burglar alarm. The containers of kerosene were then secreted in cardboard boxes and brought to the bookstore. Subsequently, Kiefer and Bonsal determined that to insure complete destruction of the building several holes would have to be made in the walls to provide a better draft. The three men then made appropriate holes, spread some papers, and left the building. Later that evening Bonsal entered the building with keys provided by Cislo. Bonsal poured kerosene in several large puddles, soaking the papers and other combustible materials, on each of the three floors in the building. These puddles he connected with trails of kerosene. Upon leaving the building Bonsal ignited the kerosene. Shortly thereafter the building was ablaze, and smoke had risen several hundred feet in the air.
>
> Cognizant of the above evidence, the government expert on explosives and incendiary devices, Warren

Parker of the Bureau of Alcohol, Tobacco and Firearms, testified that in his opinion the combination of materials described above constituted an incendiary device and therefore an explosive under federal law. Specifically, Parker indicated that the entire building filled with combustible materials, fuel oil, and kerosene-soaked papers, combined with draft holes and trails of kerosene between piles of combustible materials constituted an incendiary device.

Parker's direct examination is found in the Appendix (A. 11-16).

REASON FOR ALLOWANCE OF WRIT

This Writ of Certiorari should be granted in order to resolve the split of authority discussed in Judge Teitelbaum's Opinion, and to provide guidelines for judicial interpretation of a statute that has been amended by Congress after it has been construed by the District Court but before it was considered by the Circuit Court.

Parker's testimony clearly established that this case involved nothing more than a fire. There was no evidence whatsoever that an explosion occurred. It was this kind of situation Congress was concerned with when the words "a fire" were added by the Anti-Arson Act of 1982.

Although the Third Circuit decision recognizes the fact of the amendment, it has chosen to characterize the addition of "a fire" to the statute as a clarification of its original meaning rather than a change in its scope. Petitioners aver that such statutory construction is clearly erroneous, and creates a dangerous precedent for future litigation. Where Congress clearly acts to include new factual situations within the proscriptions of a penal statute, and where such Congressional action clearly reflects an effort to control conduct previously

left to state criminal law, such action should not be ignored by Circuit Courts considering appeals in which District Courts have placed overbroad construction upon the applicable statutes.

Denial of this Petition would encourage the Circuits to cavalierly affirm convictions of persons whose conduct *would have* been proscribed by the amended legislation, thereby creating an "ex post facto" law as applied to these individuals.

CONCLUSION

For the reasons heretofore cited and in reliance upon the legal authorities hereinabove set forth, it is respectfully submitted that a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be issued herein.

Respectfully submitted

MALCOLM M. LIMONGELLI
JOSEPH F. MURPHY, JR.

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3477 and 82-3478

UNITED STATES OF AMERICA,
Appellee

v.

ALLEN C. MORROW,
Appellant in No. 82-3477

and

SARAH F. MORROW,
Appellant in No. 82-3478

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 81-81) &
(D.C. Crim. No. 81-81-02)

Argued July 21, 1983

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*, and TEITELBAUM*, *Chief Judge*

Opinion filed September 16, 1983

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Middle District of Pennsylvania

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* Honorable Hubert I. Teitelbaum, Chief Judge of the United States District Court for the Western District of Pennsylvania, sitting by

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OPINION OF THE COURT

TEITELBAUM, *Chief Judge*.

Appellants, Allen C. and Sarah F. Morrow, husband and wife, have appealed from their conviction in the Middle District of Pennsylvania[1] of one count of conspir-

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1. On December 14, 1983, the author of this opinion accepted a conditional plea of guilty from the appellant, Allen C. Morrow, to a two count indictment at Criminal No. 81-178 in the Western District of Pennsylvania. Pursuant to a plea agreement, the government recommended that any sentence to be imposed in the Western District run concurrently with any sentence which might thereafter be imposed in proceedings in the Middle District of Pennsylvania. No other recommendation was made. Allen Morrow was sentenced to a term of imprisonment of 5 years on Count I and 1 year on Count II to run consecutively with each other and concurrently with any sentence which might thereafter be imposed in the Middle District of Pennsylvania. He was also fined a total of $10,000.

Having reserved for appeal the denial of his motion to dismiss for prosecutorial vindictiveness by his conditional plea, Allen Morrow pursued his appeal. He argued that the prosecution in the Western District of Pennsylvania was vindictive because it had been initiated only after he had insisted on his right to a jury trial on the

acy and twelve substantive counts of mail fraud in connection with the intentional destruction of an adult bookstore in Johnstown, Pennsylvania and their subsequent efforts to collect on five insurance policies covering the property. In this appeal the Morrows principally have pressed two interrelated arguments. First they contend that Count I of the indictment is duplicitous, that is, that Count I charges two separate conspiracies with two different objects permitting the jury to convict even if split as to which conspiracy and object had been proven. Second, they contend it was error to submit one of these conspiracy charges to the jury because it was incorrectly grounded in a theory that a federally proscribed explosive device had been used. They aver that the district court misinterpreted the scope of federal law and therefore permitted the jury to consider a charge for which there was insufficient evidence as a matter of law. Essentially the Morrows argue that arson alone was not proscribed by federal law in July of 1978 and that the government's proof suggested, at best, only arson and not the use of a federally prohibited explosive.

I.

To properly consider these claims, it is necessary to review only that evidence establishing the method by which the bookstore was destroyed. This evidence consists of the testimony of three individuals who actually destroyed the building, Franklin Kiefer, Donald Bonsal

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charges pending in the Middle District of Pennsylvania. On September 22, 1983, the judgment of conviction was affirmed. *United States v. Morrow*, No. 82-5153 (3d Cir. September 22, 1982).

At oral argument in the instant appeal, counsel were informed of the participation of the author of this opinion in the proceedings in the Western District of Pennsylvania. At that time counsel indicated no motion for recusal would be filed and recusal was waived. Having independently considered this matter, we conclude that there is no basis for recusal under 28 U.S.C. §47 or §455 (1976).

and Frank Cislo, and the testimony of the government expert on explosives and incendiary devices, Warren L. Parker.

The evidence established that Kiefer and Bonsal purchased twenty gallons of kerosene for the purpose of destroying the adult bookstore in Johnstown. They contacted Cislo, the manager of the bookstore, and enlisted his assistance in entering the building without activating a burglar alarm. The containers of kerosene were then secreted in cardboard boxes and brought to the bookstore. Subsequently, Kiefer and Bonsal determined that to insure complete destruction of the building several holes would have to be made in the walls to provide a better draft. The three men then made appropriate holes, spread some papers, and left the building. Later that evening Bonsal entered the building with keys provided by Cislo. Bonsal poured kerosene in several large puddles, soaking the papers and other combustible materials, on each of the three floors in the building. These puddles he connected with trails of kerosene. Upon leaving the building Bonsal ignited the kerosene. Shortly thereafter the building was ablaze, and smoke had risen several hundred feet in the air.

Cognizant of the above evidence, the government expert on explosives and incendiary devices, Warren Parker of the Bureau of Alcohol, Tobacco and Firearms, testified that in his opinion the combination of materials described above constituted an incendiary device and therefore an explosive under federal law. Specifically, Parker indicated that the entire building filled with combustible materials, fuel oil, and kerosene-soaked papers, combined with draft holes and trails of kerosene between piles of combustible materials constituted an incendiary device.

II.

The Morrows rely on *United States v. Cutler*, 676 F.2d 1245 (9th Cir. 1982); *United States v. Gere*, 662 F.2d 1291 (9th Cir. 1981); and *United States v. Birchfield*, 486 F.Supp. 137 (M.D. Tenn. 1980), to argue that notwithstanding Parker's expert testimony, the evidence discloses no violation of 18 U.S.C. §844(h) as that provision existed in July of 1978,[2] but instead suggests merely arson in violation of state law.

In assessing this argument the starting point must be, as it always is in questions of statutory interpretation, the words of the statute itself. The definition of explosive for purposes of 18 U.S.C. §844(h) is contained in 18 U.S.C. §844(j). While this provision consists of a single sentence, it is convenient to divide the section into three parts:

I "gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators and other detonating agents, smokeless powders,

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2. At that time 18 U.S.C. §844(h) (1976) provided, "whoever (1) uses an explosive to commit any felony which may be prosecuted in a court of the United States . . ." is guilty of an offense against the United States. Since that time this provision has been amended and now provides, "Whosoever (1) uses a fire or an explosive to commit a felony which may be prosecuted in a court of the United States . . ." is guilty of an offense against the United States.

The addition of the words "a fire" to 18 U.S.C. §844(h) (1976) as amended by the Anti-Arson Act of 1982, Pub.L. 97-298, 96 Stat. 1319 (1982), clearly renders meaningless arguments like those of the appellants in similar cases after the effective date of the amendment, October 12, 1982, since use of either a fire or an explosive to commit a felony is a crime. *United States v. DeLuca*, 692 F.2d 1277 (9th Cir. 1982); H.R.Rep. No. 97-678, 97th Cong., 2d Sess. *reprinted in* 1982 U.S. Code Cong. & Ad. News 2631, 2632.

II other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title.[3]

III and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device, or any part thereof may cause an explosion.

Appellants rely on the restrictive interpretation of this statute contained in *United States v. Gere, supra.* In *Gere*, the appellant challenged his conviction of an offense under 18 U.S.C. §844(i)[4]. The evidence established that Gere had destroyed a warehouse by use of trails of photocopying fluid and fluid-soaked materials to ignite simultaneous fires throughout the warehouse. Looking solely to that portion of the definition of explosives identified above as Part II of 18 U.S.C. §844(j), the Court of Appeals for the Ninth Circuit concluded that Congress did not intend to pass a general federal arson statute, but a more narrow enactment designed only to counter the specific evil of bombing. Since the court found no reason to believe the federal

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3. Part II above cross-references 18 U.S.C. §232(5) (1976) which provides:

> The term "explosive" or "incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

4. The definition of explosive is the same for purposes of 18 U.S.C. §844(h) and 18 U.S.C. §844(i) and the *Gere* decision turns on the interpretation of 18 U.S.C. §844(j).

law was meant to overlap state arson law, it reversed the conviction in that case. Appellants have urged this Court to adopt this conclusion, apply it to the facts of the instant appeal, and vacate their conviction for conspiracy in Count I.

We decline to do so finding a more persuasive analysis in *United States v. Agrillo-Ladlad*, 675 F.2d 905 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 66 (1982). In that case, the evidence established that trails of newspapers were laid out in rows and soaked with naptha. These materials were ignited and within fifteen minutes the windows had blown out, pipes were bent, and the building totally destroyed. An expert witness for the government testified that an uncontained explosion had occurred. As part of his analysis, the expert testified that the naptha gave off certain vapors that built up in the structure and combined with the air to form an explosive mixture.

Turning to the definition of explosive in 18 U.S.C. §844(j), the Court noted that the articles that had been used to destroy the building seemed to be encompassed within the plain meaning of the term incendiary bomb which is incorporated by reference into Part II of the definition and within the plain meaning of Part III of the definition. Despite the apparent inclusion of these articles within the plain meaning of the definition of explosive, the Court also examined the legislative history in depth. This examination found significant support for a comprehensive definition of explosive specifically including combinations of ordinary products that could be assembled to explode. Moreover, the court found that Congress knew that the definition adopted would overlap to some extent with state arson law. This comprehensive examination demonstrates that the rationale of *Agrillo-Ladlad*, and not of *Gere*, represents the correct understanding of 18 U.S.C. §844(j).[5]

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5. We agree too with the conclusion of the United States Court of Appeals for the Seventh Circuit that the recent amendment of 18 U.S.C. §844 by the Anti-Arson Act of 1982, Pub.L. 97-298, 96 Stat.

In reaching this conclusion, this Court finds itself in agreement with the majority of other Courts of Appeals to consider this question. *See United States v. Bunney*, 705 F.2d 378 (10th Cir. 1983); *United States v. Xheka*, 704 F.2d 974 (7th Cir. 1983); *United States v. Poulos*, 667 F.2d 939 (10th Cir. 1982); *United States v. Hewitt*, 663 F.2d 1381 (11th Cir. 1981); *United States v. Hepp*, 656 F.2d 350 (8th Cir. 1981).[6]

Having found a comprehensive construction of the definition of explosive to be in order, the Court finds the evidence sufficient in the instant case to conclude that the materials assembled by Kiefer, Bonsal and Cislo were incendiary bombs within Part II of the definition of explosive. In light of Parker's testimony that an explosion could occur when a short trail of kerosene was ignited, the Court finds an explosive existed within Part III of the definition as well. The Court rejects appellants' arguments that the structure itself could not constitute part of the incendiary device. The structure in *Agrillo-Ladlad* was essential to the creation of an explosion. The structure operated to contain the naptha vapors permitting a sufficiently explosive mixture of naptha vapor and air to be created. Again, this is consist-

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NOTE —*(Continued)*

1319 (1982) does not necessarily implicate a change in scope as much as a clarification of the original meaning of that section. *United States v. Xheka*, 704 F.2d 974, 979, n.2 (7th Cir. 1983); *United States v. Gelb*, 700 F.2d 875, 882 (2d Cir. 1983) (Van Graafeiland, J., *dissenting*). *See* H.R.Rep. No. 97-678, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 2631. *But see United States v. Gelb, supra*, 700 F.2d at 879.

6. *But see United States v. Gelb*, 700 F.2d 875 (2d Cir. 1983). Interestingly enough, while the Court of Appeals for the Ninth Circuit continues to follow *Gere*, that Court recently expressed reservations about the correctness of that decision in *United States v. DeLuca*, 692 F.2d 1277 (9th Cir. 1982). There the Court wrote, "Were we considering this issue free from our prior decisions on [18 U.S.C.] §844, we would adopt the government's position and affirm the explosives convictions." *Id.* at 1280.

ent with the legislative history. *See United States v. Agrillo-Ladlad, supra*, 675 F.2d at 909 n.5.

III.

Having found that the evidence was sufficient to support a conviction for conspiracy to violate 18 U.S.C. §844(h), it is appropriate to consider the appellants' second challenge to conviction under Count I of the indictment: the claim of duplicity. Appellants have urged this Court to conclude that conspiracy to commit mail fraud and conspiracy to use an explosive to commit mail fraud are separate and distinct conspiracies. This Court cannot agree. The essence of conspiracy is an agreement. Whether the agreement is to commit one crime or several, there is still but one agreement and one conspiracy. In other words, a single conspiracy may have multiple goals and objectives. *Braverman v. United States*, 317 U.S. 49, 53-54 (1942).

That is the case in the instant appeal. The agreement proven was to destroy a building and to collect, by use of the mails, insurance proceeds payable only for accidental destruction of the building. Destruction of the building was a prerequisite to the submission of an insurance claim. Without the submission of the insurance claim, destruction of the building would have been a futile act. Under these circumstances, the Court finds the allegations of duplicity to be without merit.

IV.

Having considered the remaining contentions of error, that the district court erred in admitting evidence of other crimes, in denying Sarah Morrow's request for severance, in permitting a witness to explain why he was biased against Allen Morrow, in prohibiting extrinsic evidence of Kiefer's criminal activities and government activities on his behalf, and in prohibiting defense counsel from reading portions of trial transcript during clos-

ing argument, the Court finds these contentions without merit.

For the foregoing reasons, judgments of conviction of Allen C. Morrow and Sarah F. Morrow will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

DIRECT EXAMINATION OF WARREN L. PARKER, December 3, 1981

(T. 3) BY MR. JONES:

Q. Now, Mr. Parker, would you state your occupation and current employment, please?

A. I'm an Explosive Enforcement Officer. I work for the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms in the Explosive Technology Branch.

Q. How long have you been employed as an Explosives Enforcement Officer?

A. Since 1974.

Q. What are your duties and responsibilities in that position?

A. I provide technical advice and assistance in administrating the Federal explosive laws that are under ATS.

Q. What is the nature of this technical (T. 4) assistance?

A. I review and evaluate reports and materials that arise out of technical questions from criminal investigations, regulatory inspections, questions from industry and the public regarding the nature and classification of various explosive, incendiary materials and devices, and the way the law covers those or are classified under the law.

Q. What prior training or experience have you had that prepared you with the knowledge for your present occupation?

A. Generally, most of my experience during my 20 years in the United States Army.

Q. What rank did you hold in the United States Army, Mr. Parker?

A. I retired as a Lieutenant Colonel.

Q. What type of training have you received?

A. I both reveived and conducted extensive training in the hazards, safety precautions, rendering safe procedures and safe disposal of all types of explosives, incendiary, chemical, biological, and radiological weapons.

Q. Mr. Parker, would you briefly explain how you utilize this knowledge in explosives for the United States Army?

(T. 5) A. I was the Commander of several explosive ordinance disposal detachments, bomb disposal units. I've provided- - I was an adviser to formations on explosives and explosive safety, and served in numerous staff positions regarding explosives and/or explosive safety.

Q. Now, Mr. Parker, were you ever officially recognized in your work with explosives?

A. Yes, sir. I received several commendations, medals for work in that area.

Q. Now, during your career with the Alcohol Tobacco and Firearms, as an explosive expert, how many explosive cases have you been involved in?

A. A conservative estimate would be several hundred, sir.

Q. Have you ever testified and have you ever been qualified as an expert witness in cases involving explosives?

A. Yes, sir, I have on numerous occasions.

Q. Have you ever been found unqualified to testify as an expert in the area of explosives and incendiary devices?

A. No, sir.

MR. JONES: Your Honor, at this point, we would submit that Mr. Parker be qualified (T. 6) as an expert in the area of incendiary devices and explosives. I ask that the Court qualify and recognize him as an expert in that.

THE COURT: Do you wish to cross-examine on qualifications, gentlemen?

MR. SEEKFORD: I'll stipulate that he.s qualified in the area as designated.

THE COURT: Any other Counsel?

MR. MURPHY: That's fine, Your Honor.

MR. JONES: Thank you.

THE COURT: You may proceed.

BY MR. JONES:

Q. Now, Mr. Parker, in your duties and responsibilities, you stated that you were involved in the classification of materials and devices for both criminal and regulatory matters, is that correct?

A. Yes, sir.

Q. Sir, did you have an occasion to participate in an investigation being conducted with respect to the burning of an adult bookstore in Johnstown, Pennsylvania, in 1978?

A. Yes, sir, I did.

Q. Now, sir, pursuant to that investigation, were you provided with a number of Exhibits, as well as statements of various individuals in (T. 7) reaching your determination?

A. Yes, sir, I was.

Q. Sir, with respect to that determination, did you reach a conclusion of whether or not that fire constituted an explosive or incendiary device?

A. Yes, sir, I did. Based upon a review of- -

MR. SEEKFORD: Objection. The question isn't responsive to- -

BY MR. JONES:

Q. How did you reach that conclusion, Mr. Parker?

A. I reviewed a State Police laboratory report that identified that there was a flammable liquid identified as kerosene, identified in several spots throughout the building.

I reviewed statements of individuals who had participated in the fire, describing how they had splashed this kerosene around on the walls, on various piles of combustible material, papers, rags, et cetera, and had broken holes in the walls to create a forced draft and allow for the propagation of

the fire from one pouring or splashing to the other, and then had reviewed the reports as to the nature and extent of the damage.

(T. 8) Based upon that review, it was my opinion that the--

MR. SEEKFORD: Objection.

THE COURT: What's the nature of the objection?

MR. SEEKFORD: Your Honor, he's received as an expert in the area of explosive and incendiary devices. But as to the interpretation of the law and the facts applied to that law, it's the Jury's determination. I think he's reached an ultimate conclusion in this case that the Jury should reach.

MR. JONES: Your Honor, we would submit that it's the Court's determination as to what the law is in this case.

Mr. Parker has not been offered as that. He's been offered simply to testify in the area of incendiary devices, and whether or not the device used in this case did, in fact, constitute an incendiary device in his opinion.

MR. SEEKFORD: Your Honor, may it please the Court, his basis is the facts and the facts are the things that the Jury is entitled to make a determination upon, based upon the (T. 9) law as the Court gives it.

This is a combined feature that this witness is going to start testifying to.

THE COURT: I'll overrule the objection and rule, as an expert, he's entitled to give his opinion and to also explain the basis on which he makes his opinion.

BY MR. JONES:

Q. You may proceed, Mr. Parker.

A. Well, based on the fact that there was a combination of articles and substances arranged in such a manner so as to propagate and spread this fire throughout this building, the fact that there was a destructive fire in that building, it was my opinion that that would constitute an incendiary device, as that term is defined in the law.

Q. Now, Mr. Parker, with respect to the term "incendiary device" that you used, in this case was there a device?

A. The device being this combination of articles. The physical act of arranging materials in such a manner so as to insure a rapid and complete burning of the building would, in fact, be an assemblage of materials constituting a device, in my opinion.

Q. Would you give an example of other types (T. 10) of incendiary devices?

MR. SEEKFORD: Objection.

THE COURT: I'll sustain the objection to that question.

BY MR. JONES:

Q. Mr. Parker, are all incendiary devices the same?

A. No, sir. There are multitudes of different combinations of materials or articles or substances that could be arranged in such a manner so as to form an incendiary device.

Most of my job is to lay out these circumstances and facts, and actual usage of materials to determine what their design, their construction, functioning and effects are, and then based on having looked at all of those factors, if they fit the criteria for incendiary device, and then make my determination.

Q. What were the unique combination of elements in this case that led you to the conclusion that this was, in fact, an incendiary device?

MR. SEEKFORD: Objection, Your Honor. He said "unique." It's not been testified that this was a unique situation.

THE COURT: We'll overrule the objection. (T. 11) You're asking what the specific factors are?

MR. JONES: Yes, Your Honor.

THE WITNESS: The specific factors were the pouring or splashing of what we call "trailers," that is, spills of flammable liquid connecting piles of other flammable and combustible material, and the making of the holes in the walls forming these connecting links, and the fact that other combustibles were there to add to the intensity of the fire, as well as the trailers to spread them, really were the specific things that caused it to fall into the category of an incendiary device.

BY MR. JONES:

Q. Now, Mr. Parker, when you're referring to the word "trailers," you must forgive me, I'm not expert in the area of fires. Are you referring to the kerosene trails spread throughout the building?

A. Yes. That is what we would call a trailer. It's an actual, physical connection of flammable liquids. They carried

the fire from one point to the other, insuring that the fire propagates throughout a room or a building.

Q. Now, Mr. Parker, are you also familiar (T. 12) with the terminology "hot spots"?

A. Yes, sir. That's a common term that is used in the fire in describing areas of origin or numbers- -points of origin.

Q. Now, would a pile of papers, such as shown on Government Exhibit No. 1.19, to have been doused with kerosene and then ignited by some type of flame, would that be considered a hot spot or would something else be?

A. In evaluating pictures such as this, we look at burn patterns, intense heat and charring to determine that was a point of origin, or there was a hot spot there. Then, in looking throughout the rest of the building, you determine if there were multiple hot spots or multiple points of intense burning, which would be unnatural to the normal conditions of that building and so forth. Those would also indicate that this was not an accidental fire, or not something that started on its own.

The fact that there were the connecting links and the multiple points where there was extreme heat and burning much more than would normally occur.

Q. Also, with respect to this photograph, Mr. Parker, 1.19, you'll notice along the walls that there is a discoloration. Would you explain to the Jury, (T. 13) in your opinion, what that is the result of?

A. That's the result of an intense fire, that is, the splashing and pouring and the concentration of flammable liquids very often make that identical pattern.

I've seen it in a number of cases where it's been identified that that was the source. In fact, when we investigate arsons, this is the kind of thing that we look for as a source of selecting our materials to determine whether or not there were accelerants present. These patterns point to the spot where you start looking.

Q. Now, the black sooty material on the walls, are you familiar with the type of smoke and heat that is produced by, say, a kerosene fire?

A. I think that is typical of kerosene burning where there is not quite enough oxygen. For example, anyone who has seen a kerosene lamp, when you turn the kerosene lamp up, you get the black sooty smoke that smokes the chimney up. This is the kind of thing you get here when there is a considerable amount of it and the burning is leaving the residue on the walls.

Q. Now, Mr. Parker, you also indicated that one of the factors which you considered in reaching your (T. 14) conclusion whether or not this was an incendiary device, is that holes were knocked in the walls. Why was that, sir?

A. I believe it would be for two purposes. One, to provide for vending, to provide more air for the fire mixture, to cut down--provide more heat.

And, two, to lead from one--provide a lead from one room or one floor to another so that the fire will propagate to all areas at the same time.

Q. Now, Mr. Parker, in your opinion, as an expert, is it that this entire building itself, with the combination of the elements, along with the intent of the parties, constituted the incendiary device itself?

A. The building constituted the combustible materials, the property, the fuel oil, the piles of papers, splashing with fuel oil, the fact that there were holes and trailers, holes cut in walls and trailers connecting all of these various hot spots or piles of combustibles was, in fact, a device.

The building was the property and then the fact that the fire was intentionally or maliciously set make up the total combination of elements that you got to have, a combination of articles or substances having the capacity of producing sufficient heat to (T. 15) ignite and burn other combustible materials, and it must be intended to destroy property.

Q. There was no need, Mr. Parker, was there, for there to be a device that you could actually hold in your hands?

A. No, sir, none whatsoever.

MR. JONES: Thank you, Mr. Parker. No further questions, Your Honor.

THE COURT: Mr. Seekford, do you wish to cross-examine.

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No. 83-717

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALLEN C. MORROW AND SARAH F. MORROW, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the evidence was insufficient to support their convictions for conspiracy to commit a felony by the use of an "explosive", as that term was defined in 18 U.S.C. 844(j) prior to its amendment by the Anti-Arson Act of 1982 (Pub. No. 97-298, § 2, 96 Stat. 1319).

1. Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners were convicted on one count of conspiring to use an explosive to commit mail fraud, in violation of 18 U.S.C. 371, 844 and 1341, and several substantive mail fraud counts, in violation of 18 U.S.C. 1341.[1] Petitioner Allen Morrow was sentenced to six years' imprisonment and fined $18,000. Petitioner Sarah Morrow was sentenced to six months' imprisonment, to be followed by three years' probation, and fined $10,000.

[1] Petitioners raise no challenge to their convictions on the mail fraud counts.

The evidence adduced at trial showed that petitioners, owners of an adult bookstore in Johnstown, Pennsylvania, conspired to destroy the bookstore in order to collect the proceeds of five insurance policies they held covering the property. The actual destruction of the bookstore was accomplished by Franklin Kiefer, Donald Bonsal, and Frank Cislo. Kiefer and Bonsal bought 20 gallons of kerosene, which they brought to the bookstore secreted in cardboard boxes. Kiefer, Bonsal, and Cislo then drilled holes in the walls of the bookstore building in order to create a draft, spread some papers, and left the building. Later that evening, Bonsal returned to the bookstore and poured kerosene in several large puddles, soaking the papers and other combustible materials on each of the three floors of the building. Bonsal connected these puddles with trails of kerosene. As he left the building, Bonsal ignited the kerosene, setting the building ablaze. Pet. App. A4.

Warren Parker, an expert on explosives and incendiary devices employed by the Bureau of Alcohol, Tobacco and Firearms, testified that, in his opinion, the entire building filled with combustible materials, fuel oil, and kerosene-soaked papers, combined with draft holes and trails of kerosene between piles of combustible materials, constituted an incendiary device and, therefore, an explosive under federal law. Pet. App. A4, A16-A20.

2. Petitioners contend (Pet. 5) that this Court should resolve the conflict of authority among the circuits concerning the construction of the term "explosive," as used in 18 U.S.C. 844 prior to the amendment of that statute by the Anti-Arson Act of 1982. As recently as November 28, 1983,

this Court denied a petition for a writ of certiorari presenting substantially the same claim. *Xheka* v. *United States*, No. 83-338.[2] There is no reason for a different result here.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

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[2]We have served a copy of our brief in opposition in *Xheka* on counsel for petitioners.

[3]Petitioners suggest (Pet. 5-6) that the court of appeals erroneously relied on the Anti-Arson Act in construing the pre-amendment law. As the court of appeals' opinion makes clear, however, that court based its affirmance of petitioners' convictions on the pre-amendment case law (see Pet. App. A6-A9), merely noting (*id.* at A7-A8 n.5 (emphasis added)) that it "agree[d] *too*" with the Seventh Circuit's observation in *United States* v. *Xheka*, 704 F.2d 974, 979 n.2 (1983), cert. denied, No. 83-338 (Nov. 28, 1983), that the Anti-Arson Act "does not necessarily implicate a change in scope as much as a clarification of the original meaning of that section."

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